APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 11918

MICHAEL A. JONES, APPELLANT,

v.

UNITED STATES, APPELLEE.

Appeal from the Superior Court of the District of Columbia

(Hon. Eugene N. Hamilton, Hearing Judge)

(Argued December 5, 1977 Decided November 28, 1978)

Silas J. Wasserstrom, Public Defender Service, with whom *Alan F. Greenwald*, Public Defender Service, was on the brief, for appellant.

Joel S. Perwin, Assistant United States Attorney, with whom *Earl J. Silbert*, United States Attorney, and *John A. Terry*, Assistant United States Attorney, were on the brief, for appellee.

Before KELLY, MACK, and FERREN, *Associate Judges*.

Associate Judge MACK concurs at page 17.

FERREN, *Associate Judge*: The trial court found appellant Michael Jones not guilty of petit larceny by reason of insanity. After a "release hearing," D.C. Code

1973, § 24-301(d), the court committed Mr. Jones indefinitely to St. Elizabeths Hospital. This case presents one question: whether Michael Jones is constitutionally entitled to release from St. Elizabeths upon expiration of the maximum period for which he could have been imprisoned (in this case one year), unless the government carries the burden of proving, at a civil commitment hearing, D.C. Code 1973, § 21-545(b), that Mr. Jones is still mentally ill and dangerous to self or others.

Appellant does not challenge the validity of his initial commitment to St. Elizabeths after the "release hearing." On the assumption, therefore, that this commitment was lawful, we can perceive no constitutional requirement that appellant be released or civilly committed at the end of the maximum imprisonment period, for that period bears no relationship to the unchallenged basis for appellant's hospital confinement: that he is mentally ill, is dangerous to self or others, and should receive treatment until he is well enough for release. We therefore affirm the denial of appellant's motion for civil commitment or release.

I.

On September 19, 1975, the police arrested Michael Jones for attempting to steal a coat from a department store. The next day the government charged him with attempted petit larceny; and, following a competency examination yielding a finding of mental illness, he was arraigned and ordered to St. Elizabeths for mental observation pursuant to D.C. Code 1973, § 24-301(a). He remained in the District of Columbia jail for four and one-half months until bed space became available at St. Elizabeths on February 4, 1976.

Following the observation period, appellant went to trial on stipulated facts. In an uncontested proceeding,

the trial judge entered a judgment of not guilty by reason of insanity. Thereafter, he recommitted appellant to St. Elizabeths temporarily, pursuant to D.C. Code 1973, § 24-301(d)(1). On May 25, 1976, appellant was afforded his § 24-301(d)(2) "release hearing," at which the court determined that he was mentally ill and likely to be dangerous to himself or others in the reasonable future. The court accordingly continued his commitment to St. Elizabeths—indefinitely.

At this juncture the procedural history of the case becomes murky. Apparently, upon conclusion of the May 25 proceeding, the court ordered a further hearing for November 29, 1976. When that date arrived appellant's counsel appeared before Judge Hamilton and orally requested that appellant be released—or civilly committed—since his cumulative hospital confinement had exceeded the one-year maximum period of incarceration for attempted petit larceny. No attorney appeared for the government. The judge responded with an order that the government either pursue civil commitment or show cause why the "criminal commitment" should not be vacated by January 18, 1977.

During the seven-week period which followed, it appears that the government initiated the civil commitment process—resulting in a recommendation of such commitment by the staff of St. Elizabeths—and then changed course, deciding to contest the court's order. The government persuaded the court to modify its order by requiring appellant to file a written motion for civil commitment or release, and by allowing the government time to respond.

The matter came on for hearing on February 22, 1977. After extended argument, the court denied appellant's motion and reaffirmed the findings of May 25, *i.e.*, that

appellant was mentally ill and likely to be dangerous. Appellant noted an appeal and, on June 14, 1977, filed a motion in this court for summary reversal. The government responded with a motion for summary affirmance. The motions division of this court rejected both requests for summary disposition. Instead, we ordered expedited oral argument on the appeal. After argument before this division of the court, we called for post-argument briefs.

In his final brief, appellant confirms the narrow scope of the question presented in this appeal. "[A]ppellant's position has been, and remains, . . . that *even if* an automatic commitment following an insanity acquittal is *permissible*, continued confinement beyond a certain point of time—at the latest when the prison sentence which could have been imposed had the defendant been convicted has run—is constitutionally *impermissible* unless the government can prove the necessity of such continued confinement just as it would have to prove the necessity where it seeks civil commitment" (emphasis in original). Thus, we are not confronted with a challenge to the process for initial commitment which ordinarily follows an insanity acquittal. We are faced only with the constitutional propriety of hospitalization beyond the period of a maximum prison term, absent invocation of the protections of the civil commitment process.

II.

According to appellant, the principles of *Baxstrom v. Herold*, 383 U.S. 107 (1966), *Bolton v. Harris*, 130 U.S. App.D.C. 1, 395 F.2d 642 (1968), and, more directly, *Waite v. Jacobs*, 154 U.S.App.D.C. 281, 475 F.2d 392 (1973), mandate a conclusion that the equal protection clause is transgressed when insanity acquitees are held beyond their maximum potential terms of imprisonment

without the intervention of civil commitment procedures.[1] To comprehend his argument fully, a brief history is in order.

Prior to the circuit court's 1968 *Bolton* decision, a successful insanity plea resulted in automatic, indeterminate confinement to a mental hospital. Because there was no required judicial review of such confinements, the "statutory scheme would [have] conceivably allow[ed] a patient committed under [D.C. Code 1967, § 24-301(d)] to remain in the hospital for the rest of his life without a judicial determination that he [was] mentally ill or that he [was] still likely to commit dangerous acts." *Bolton*, *supra* at 7, 395 F.2d at 648. At that time, however, as today, the 1964 Hospitalization of the Mentally Ill Act, D.C. Code 1973, §§ 21-541 to -545, provided numerous protections for civilly committed persons—including, significantly, the right to a jury trial with the burden on the government to prove mental illness and dangerousness beyond a reasonable doubt. In *Bolton*, therefore, the circuit court explored the "sharp contrast" between the two commitment schemes in light of the Supreme Court's *Baxstrom* principle "that the commission of criminal acts does not give rise to a presumption of dangerousness which, standing alone, justifies substantial difference in commitment procedures and confinement conditions for the mentally ill." *Bolton*, *supra* at 6, 395 F.2d at 647. Concluding that the differences between the two groups, insanity acquitees and civil commitees, could not constitutionally support most of the

[1] The Fifth Amendment's due process clause includes an equal protection safeguard against federal and District of Columbia governmental actions. *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Davis v. Washington*, 168 U.S.App.D.C. 42, 43 n.2, 512 F.2d 956, 957 n.2 (1975), *rev'd on other grounds*, 426 U.S. 229 (1976).

differences in procedure, the court read most of the 1964 Act's civil commitment safeguards into the "insane criminal" commitment scheme.[2] Thereafter, acquitees were entitled to a "*Bolton* hearing" after trial: "a judicial hearing with procedures substantially similar to those in civil commitment proceedings." *Id.* at 10, 395 F.2d at 651 (footnote omitted).

In 1970, however, Congress responded to the *Bolton* decision by amending § 24-301 of the D.C. Code. Dissatisfied with the anticipated consequences of *Bolton*, Congress attempted to accommodate the acquitee's constitutional rights and provide rehabilitative opportunities while protecting the public against anticipated danger. *United States v. Jackson*, 179 U.S.App.D.C. 375, 381, 553 F.2d 109, 115 (1976). By the terms of the amended, and currently applicable, § 24-301, an insanity acquitee once again faces automatic commitment:

> If any person tried upon an indictment or information for an offense raises the defense of insanity and is acquitted solely on the ground that he was insane at the time of its commission, he shall be committed to a hospital for the mentally ill until such time as he is eligible for release pursuant to this subsection or subsection (e). [D.C. Code 1973, § 24-301(d)(1).]

The next paragraph of the statute, however, eliminates the pre-*Bolton* possibility of indeterminate commitment without judicial review. Congress provided for an automatic, legislatively tailored "release hearing" within 50 days of the § 24-301(d)(1) commitment:

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[2] The court expressly permitted two distinctions to continue: (1) automatic, temporary commitment of acquitees and (2) mandatory court review of a hospital's release decision for acquitees. *Bolton*, *supra* at 10-11, 395 F.2d at 651-52.

> A person confined pursuant to paragraph (1) shall have a hearing, unless waived, within 50 days of his confinement to determine whether he is entitled to release from custody. . . . If the hearing is not waived, the court shall cause notice of the hearing to be served upon the person, his counsel, and the prosecuting attorney and hold the hearing. Within ten days from the date the hearing was begun, the court shall determine the issues and make findings of fact and conclusions of law with respect thereto. [D.C. Code 1973, § 24-301(d)(2), in relevant part.]

Additionally, the 1970 amendments provided for habeas corpus relief, § 24-301(g), as well as for a more specific motion mechanism for seeking release (no more often than every six months), § 24-301(k).

As we have noted, however, the major impetus for legislative action was anxiety about the *Bolton* limitation on the ability to continue commitment of those who successfully interpose insanity defenses to criminal charges. Thus, for our purposes here, the most notable features of the 1970 amendments are not the new procedures afforded acquitees but the omitted or retracted guarantees which had been extended by the *Bolton* decision. It is the differences between the post-1970 "modified *Bolton*" scheme under which appellant was committed and has continued to be confined, D.C. Code 1973, § 24-301, and the current civil commitment processes, D.C. Code 1973, § 21-501 *et seq.*, which had been extended to acquitees by *Bolton*, that must be the focus of our equal protection analysis. These differences are substantial.

Civil commitees have "commitment hearings" at which the government bears the burden of proving "mental

illness" and likelihood of injury to "himself or other persons" beyond a reasonable doubt. D.C. Code 1973, § 21-545(b); *In re Ballay*, 157 U.S.App.D.C. 59, 482 F.2d 648 (1973). In contrast, at a § 301(d)(2) "release hearing," the acquitee must carry the burden of demonstrating by a "preponderance of the evidence" that he "has recovered his sanity and will not in the reasonable future be dangerous to himself or others." D.C. Code 1973, §§ 24-301(d)(2), -301(e). The civil commitment process affords a jury, § 21-545; the acquitee "release hearing" process does not. *See* § 24-301. Release of a civil commitee does not require court supervision, § 21-546, whereas the court retains the last word for acquitees, § 24-301(e). The civil scheme furnishes regular six-month review initiated by the hospital, § 21-548, while the scheme for acquitees mandates review only upon a motion for relief, § 24-301(k), or petition for habeas corpus, § 24-301(g), initiated by the patient (while permitting review initiated by the hospital, § 24-301(e)).

Appellant maintains that even if the rationale for different commitment procedures is valid,[2] it must expire at a time no later than the end of the maximum prison term which could have resulted from criminal conviction.

[2] Although the issue has not been resolved, there has been much discussion concerning the propriety of the 1970 insanity commitment amendments and their vulnerability of a new *Bolton*-type challenge. *See Bethea v. United States*, D.C.App., 365 A.2d 64, 92 (1976), *cert. denied*, 433 U.S. 911 (1977); *United States v. Jackson*, *supra*; *United States v. Ecker*, 177 U.S.App.D.C. 31, 40-41, 543 F.2d 178, 187-88 (1976), *cert. denied*, 429 U.S. 1063 (1977); *United States v. Wright*, 167 U.S.App.D.C. 309, 311 n.9, 511 F.2d 1311, 1313 n.9 (1976); *Johnson v. Robinson*, 166 U.S.App.D.C. 62, 66, 509 F.2d 395, 399 (1977); *United States v. Brown*, 155 U.S.App.D.C. 402, 491 n.3, 478 F.2d 606, 608 n.3 (1973); *Dixon v. Jacobs*, 138 U.S.App.D.C. 319, 332-34, 427 F.2d 589, 602-04 (1970) (Leventhal, J., concurring and dissenting).

His claim, in effect, is that the running of the potential prison term activates *Baxstrom* and *Bolton* principles which entitle him, at that time, to additional safeguards. We therefore turn to the merits of appellant's claim.

III.

The United States Court of Appeals for the District of Columbia Circuit has given a measure of judicial endorsement to appellant's theory in *Waite v. Jacobs*, *supra*. In *Waite*, a pre-*Bolton* acquitee who could not reap *Bolton's* prospective benefits, *Bolton*, *supra* at 12-13, 395 F.2d at 653-54, made essentially the same claim that appellant makes here. The circuit court found merit in this equal protection claim. The court observed that

> after the expiration of the period for which an acquittee might have been incarcerated had he been convicted, it may be irrational, within the meaning of equal protection doctrine, to distinguish between an acquittee and a commitee. Acquitees who have been confined for that period, therefore, may be entitled to treatment no different from that afforded commitees. [*Waite v. Jacobs*, *supra* at 284, 475 F.2d at 395.]

The court then stated the issue to be "whether appellant, in seeking release from confinement, is on an equal footing with a commitee," *id.* at 288, 475 F.2d at 399, or, as a matter of law, is situated differently from a commitee. Adverting to the radical differences in initial treatment (pre-*Bolton* v. civil commitment), the court perceived that pre-*Bolton* acquitees and commitees were not on equal footing; it then opined that equal protection might well be transgressed in Waite's case, for "just as it is unconstitutional to place a burden on only one of two similarly situated persons [the traditionally accepted meaning of equal protection], *so also may it be irrational*

to place similar burdens on persons situated differently." *Id.* (emphasis added). The court concluded, "it would seem that [appellant] ha[d] a right to a hearing, with all the procedural safeguards available in civil commitment proceedings." *Id.* at 289, 475 F.2d at 400. Because, however, there was a possibility that Waite's commitment actually was attributable to a civil commitment which had preceded the criminal action, and because the court's novel equal protection analysis had not been briefed or argued, the court did not order specific relief; instead, it remanded the case to the district court for further proceedings.

It is this novel, call it "equalization," theory of equal protection which appellant invokes here—a theory that equal treatment of the two groups, commitees and acquitees, eventually requires remedial, *i.e.*, compensating, procedures for acquitees because their initial commitments were more perfunctory. For several reasons, however, we have concluded that the *Waite* analysis is inapplicable to this case.[4]

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[4] At least four subsequent circuit court opinions have mentioned *Waite* approvingly. Only one, however, definitely approved the "equalization" approach to an equal protection challenge, *see Johnson v. Robinson, supra*, and the expression of approval in *Johnson* is dicta. (The court, observing that appellant wished the "constitutional suggestion" of *Waite* transformed into a holding, required appellant first to present his *Waite*-based argument to the local District of Columbia courts.) In *United States v. Ecker, supra; United States v. Brown, supra;* and *Dixon v. Jacobs, supra* (Leventhal, J., concurring and dissenting), the court reaffirmed *Waite's* "equal footing" conclusion; *i.e.*, that at the end of the maximum period for which acquitees could have been sentenced, no differentiation is acceptable between them and committees. It is not clear, however, that those opinions adopted the "equalization" analysis mandating additional, remedial procedures for acquitees at that point.

In the first place, Waite's situation is factually distinguishable from that of appellant Jones. Waite, a pre-*Bolton* acquitee suffered from the "no judicial review" (save habeas corpus) system condemned in *Bolton*. He had been automatically, indefinitely committed as presently ill and dangerous because he successfully raised a mere reasonable doubt about his legal sanity at the time of committing the offense.[5] Because of the unfortunate circumstances of his pre-*Bolton* status, Waite had remained confined in a mental hospital without ever receiving constitutional, procedural protections.[6]

Jones, on the other hand, is a post-*Bolton*, post-1970 acquitee. Unlike Waite, Jones carried the burden at his criminal trial of proving by a "preponderance of the evidence" that he was insane at the time he committed the offense. D.C. Code 1973, § 24-301(j). In addition, while receiving less than a *Bolton* (civil commitment) hearing after the criminal trial, Jones did receive substantially more protection than Waite by virtue of the § 24-301(d)(2) "release hearing." Thus, upon Jones' indefinite commitment, he was in a factually different posture from Waite vis-a-vis civil commitees. *See Johnson v. Robinson*, 166 U.S.App.D.C. 62, 66, 509 F.2d 395, 399 (1974).

Second, at the time of indefinite commitment, Jones also was in a legally different posture from Waite vis-a-

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[5] For discussions of the irrationality of basing a finding of present mental illness on a previous doubt about sanity, *see United States v. Brown*, *supra* at 409, 478 F.2d at 613 (Wright, J., dissenting); *Bolton*, *supra* at 6, 395 F.2d at 647.

[6] That the inequity of the situation may have influenced the court's reasoning is intimated by the *Waite* opinion, *Waite v. Jacobs*, *supra* at 284 n.7, 475 F.2d at 395 n.7, and by *Johnson v. Robinson*, *supra* at 63, 509 F.2d at 396, both of which referred to the "anomaly" created by *Bolton's* prospective application.

vis civil committees. Because Waite was a pre-*Baxstrom*, pre-*Bolton* acquitee, his initial commitment was constitutionally invalid; the court accordingly found him, as a matter of law, "situated differently" from a civil committee. *Waite*, *supra*, at 288-89, 475 F.2d 399-400. Jones, to the contrary, proceeds from the premise that the § 24-301(d) safeguards in his release hearing were constitutionally sufficient to fill the historical gap in protection (upon initial commitment) between acquitees and committees--the gap which persuaded the circuit court to assist Waite, and Bolton before him, on equal protection grounds.

The present case, therefore, is significantly different from *Waite*, which was a decision explicitly limited to pre-*Bolton* acquitees. *Waite*, *supra* at 285 n.8, 475 F.2d at 396 n.8. We are presented here with a much narrower question: whether, as a matter of equal protection, the differences in *valid* initial commitment procedures for acquitees and committees are nevertheless significant enough to require a remedy for the acquitee at the expiration of the maximum period for which he could have been sentenced—a remedy granting him either his outright release or a second (this time purely civil) commitment proceeding. The constitutional rationale for such a remedy, assuming for argument's sake the validity of *Waite's* equalization theory for equal protection, would be that the post-1970 acquitee, like the pre-*Bolton* acquitee, has been "situated differently" from a committee (while treated the same), despite the presumed validity of the respective initial commitment procedures. We therefore must examine whether, as a matter of law, situational differences can be said to exist upon confinement.

An acquitee's § 24-301 release hearing and a committee's § 21-545(b) civil commitment hearing both pur-

port to determine whether one is mentally ill and dangerous.[7] Thus, these respective procedures can result in differently situated confinees only if the acquitee's hearing results in a perversion of that determination when compared with a commitee's hearing.

One such perversion would be a determination derived, in part, by reference to the criminal offense.[8] Because appellant's confinement after a § 24-301 release is not challenged, however, appellant must be presumed to agree that this confinement is not based, even in part, on punitive considerations; otherwise, it would be unconstitutional under *Baxstrom*, *supra*; *see Humphrey v. Cady*, 405 U.S. 504, 510-11 (1972); *Waite*, *supra* at 285-86, 475 F.2d 396-97; note 8 *supra*. Therefore, absent any explanation as to why the § 24-301(d) release hearing results in lesser quality findings of illness and dangerousness than a § 21-545(b) civil commitment hearing, we must conclude that the findings are legally the same.

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[7] The determination for an acquitee is whether he "has recovered his sanity [and] . . . will not in the reasonable future be dangerous to himself or others." D.C. Code 1973, § 24-301(e). The determination for a potential commitee is whether "the person is mentally ill and, because of that illness, is likely to injure himself or other persons if allowed to remain at liberty." D.C. Code 1973, § 21-545(b).

[8] More particularly, one might argue that an acquitee's commitment is actually based on more than a mentally ill and dangerous finding—that the acquitee's burden to prove his sanity, without right to jury trial, reflects a punitive gloss derived from his previous criminal behavior. It would follow that an acquitee is situated differently from a commitee because this extra, punitive basis for commitment has permitted an abbreviated, more burdensome release hearing, resulting, arguably, in a less valid finding of mental illness and dangerousness than the civil commitment process would yield.

It is true, of course, that appellant's criminal offense is the reason why his confinement took place by way of § 24-301(d), not § 21-545(b). Thus, in order to be as clear as possible why it makes no legal difference in this case whether appellant was initially confined under the "insane criminal" or the civil commitment procedure, we should explain (without deciding) the argument why § 24-301(d) is not punitive—why, under § 24-301(d) the criminal offense does not provide a basis for confinement. Once it is clear that § 24-301(d) and § 21-545(b) arguably establish equally valid procedures for determining mental illness and dangerousness, it should then be clear why appellant's request here—release or civil commitment at the end of the maximum potential prison term—is inconsistent with the presumed validity of his confinement.

Arguably, the acknowledged differences between the two procedures—most notably the right to jury trial and allocation of the burden of proof to the government under the civil commitment scheme—can be justified by reference to situational differences between the two groups immediately prior to the respective hearings. The civil commitment question, as to any potential committee, is of first impression, whereas the "release hearing" procedure for an acquittee presumably can be somewhat abbreviated because of the predictive value of the initial determinations of insanity and dangerousness at the criminal trial. (That predictive value rests on the defendant's own prior proof of his insanity by a preponderance of the evidence—by a jury trial if he requested it.) Whereas the § 24-545(b) hearing, therefore, represents a de novo process, the § 24-301(d) hearing is an updating process to determine how present mental status compares with earlier findings which had been urged by the defendant himself. *See* note 7 *supra*. In either case, the

only concern is a determination as to sanity and dangerousness, with a view to rehabilitation. Given these situational differences between acquitees and potential commitees immediately prior to the initial commitment determination, the difference in hearing procedures is arguably justified; there is no constitutional prohibition against rational differences in the treatment of differently situated persons.

There is accordingly, no room for appellant's contention that his hospital confinement must cease (subject to civil commitment) at the end of the maximum term for which he could have been confined to prison. Although the confinement procedures differ for acquitees and commitees, the status of each group after confinement is the same: each has been found mentally ill and dangerous, and each, as a result, has been confined for the protection of self or society, as well as for treatment, not punishment.* The termination of the maximum sentence period is thus irrelevant to the status of acquitees; that termination does not alter the similarity of situation between acquitees (after confinement) and commitees.

In summary, the length of a hypothetical potential prison term has no relationship to the rehabilitative goal of hospital confinement. If, as the presumed validity of appellant's initial commitment implies, the differences in hearing procedures for acquitees and commitees are justified because, prior to hearing, they are differently situated, there is no rational, let alone constitutional, basis for arguing that an abrupt change of procedure is required simply because somewhere along the line the hypothetical maximum sentence has ended. The proper

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* Appellant has not argued that his physical or other treatment at St. Elizabeths, as an acquitee, differs in a legally significant way from that accorded to commitees.

APPENDIX B

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 11918

MICHAEL A. JONES, APPELLANT,

v.

UNITED STATES, APPELLEE.

On Petition for Rehearing

(Hon. Eugene N. Hamilton, Hearing Judge)

(Argued April 16, 1979 Decided February 4, 1980)

Silas J. Wasserstrom, Public Defender Service, appointed by the court, for appellant.

Cheryl M. Long, Assistant United States Attorney, with whom *Earl J. Silbert*, United States Attorney at the time the brief was filed, *John A. Terry*, *Oscar Altshuler*, and *Richard W. Goldman*, Assistant United States Attorneys, were on the brief, for appellee.

Before KELLY, MACK, and FERREN, *Associate Judges*.

Opinion for the court by *Associate Judge* FERREN.

Concurring opinion by *Associate Judge* MACK at p. 15.

Dissenting opinion by *Associate Judge* KELLY at p. 15.

FERREN, *Associate Judge*: Michael A. Jones was found not guilty of petit larceny by reason of insanity. Thereafter, the court held a "release hearing" pursuant to D.C. Code 1973, § 24-301(d), and committed Jones indefinitely to St. Elizabeths Hospital. In our first opinion, reported at [illegible] A.2d 183 (1978), we rejected Jones' contention that he is entitled, as a matter of equal protection, to release from St. Elizabeths upon expiration of the maximum period for which he could have been imprisoned unless the government carries the burden of proving at a civil commitment hearing that he is still mentally ill and dangerous to self or others. *See* D.C. Code 1973, § 21-545(b). More specifically, assuming the validity of Jones' confinement after the "release hearing" (which is uncontested here), we held there is

> no constitutional requirement that appellant be released or civilly committed at the end of the maximum imprisonment period, for that period bears no relationship to the unchallenged basis for appellant's hospital confinement: that he is mentally ill, is dangerous to self or others, and should receive treatment until he is well enough for release. [*Jones*, *supra* at 184.]

After reconsideration, we vacate our first order. We conclude that an acquitee may not be confined for treatment pursuant to § 24-301(d) beyond the maximum period for which he or she could have been imprisoned for the underlying criminal charge. An acquitee is entitled to release at the end of that period unless the government obtains a civil commitment. Accordingly, because that maximum period of one year has expired here, appellant Jones shall be released unless civilly committed forthwith.

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I.

Central to the analysis in our first opinion was the following legal premise, based on *Baxstrom v. Herold*, 383 U.S. 107 (1966): if commitment to St. Elizabeths after a § 24-301(d)(2) "release hearing" is to survive an equal protection challenge, it may not be punitive in any respect.[1] In other words, the commitment procedure must be wholly rehabilitative—wholly a process for finding someone mentally ill and dangerous to self or others. *Jones, supra* at 188 & n.7.[2] Consequently, we concluded that appellant's failure to challenge the § 24-301(d) "release hearing" procedure meant that

> appellant must be presumed to agree that this confinement is not based, *even in part*, on punitive considerations; otherwise, it would be unconstitutional under *Baxstrom, supra; see Humphrey v. Cady*, 405 U.S. 504, 510-11 . . . (1972);

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[1] In *Baxstrom*, the Court held that a prisoner who was civilly committed as insane at the end of his prison term was denied equal protection by a statutory procedure which deprived him of a jury review accorded to other civil commitees. Since *Baxstrom*, the Court has upheld other equal protection challenges by individuals who enter mental health facilities through the criminal process. *See Jackson v. Indiana*, 406 U.S. 715 (1972) (equal protection violated by state procedures which provide more lenient commitment standards and more stringent release standards for those criminal defendants found incompetent to stand trial than for those civilly committed); *Humphrey v. Cady*, 405 U.S. 504 (1972) (remand for evidentiary hearing on claim that protections afforded those civilly committed were not extended to those committed under sex crimes act).

[2] Put still another way, if § 24-301(d) is constitutional, it must merely be another equally valid route to the same finding derived from the civil commitment process under D.C. Code 1973, § 21-545(b). *See Jones, supra* at 188 n.7.

> *Waite* [*v. Jacobs*, 154 U.S.App.D.C. 281, 285-86, 475 F.2d 392, 396-97 (1973)] . . . . Therefore, absent any explanation as to why the § 24-301(d) release hearing results in lesser quality findings of illness and dangerousness than a § 21-545(b) civil commitment hearing, we must conclude that the findings are legally the same. [*Jones*, *supra* at 189 (emphasis added).][3]

In his petition for rehearing, appellant questions our legal premise. He argues, in effect, that the § 24-301(d) "release hearing" procedure is to some extent punitive, as evidenced by the less-protective procedures afforded acquitees than civil commitees; that *Baxstrom*, *supra*, does not necessarily make that procedure unconstitutional as a means for initially confining acquitees; but that the price of constitutionality is release or civil commitment at the end of the hypothetical maximum prison term, since that is the longest an acquitee can be confined for punitive reasons without a denial of equal protection of the laws.

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[3] We concluded, accordingly, that there was "no room for appellant's contention that his hospital confinement must cease (subject to civil commitment) at the end of the maximum term for which he could have been confined to prison. Although the confinement procedures differ for acquitees and commitees, the status of each group after confinement is the same: each has been found mentally ill and dangerous, and each, as a result, has been confined for the protection of self or society, as well as for treatment, not punishment. The termination of the maximum sentence period is thus irrelevant to the status of acquitees; that termination does not alter the similarity of situation between acquitees (after confinement) and commitees." [*Jones*, *supra* at 189 (footnote omitted).]

Appellant derives his argument primarily from *United States v. Brown*, 155 U.S.App.D.C. 402, 407-08, 478 F.2d 606, 611-12 (1973), in which the United States Court of Appeals for the District of Columbia Circuit acknowledged—and upheld—a partially punitive underpinning to the former § 24-301(d) procedure. Specifically, the *Brown* court upheld an instruction, based on *Bolton v. Harris*, 130 U.S.App.D.C. 1, 395 F.2d 642 (1968), that the government had the burden at a "release hearing" of proving respondent mentally ill and dangerous by a preponderance of the evidence, and further held that this instruction would not violate equal protection even if the government, in a civil commitment proceeding, had the burden of proof beyond a reasonable doubt.[4] The *Brown* majority justified this lesser burden of proof in the criminal commitment procedure in the following way:

> The difference between the classes [acquitees and commitees] for purposes of burden of proof, is in the extent of possibility and consequence of error. If there is error in a determination of mental illness that results in a civil commitment, a person may be deprived of lib-

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[4] The *Brown* court, therefore, was dealing with the earlier § 24-301(d) procedure. In the present case we deal with the post-1970 scheme under which an acquitee has the burden of proving, by a preponderance of the evidence, that he has recovered his sanity. *See Jones, supra* at 185.

The recent case of *In re Nelson*, D.C.App., —— A.2d —— (No. 13768, Dec. 4, 1979), indicated that the proper burden of proof in civil commitments should be "clear and convincing evidence" rather than proof "beyond a reasonable doubt" in light of *Addington v. Texas*, 99 S.Ct. 1804 (1979). The level of the government's burden in civil commitment proceedings does not affect our analysis here, however, since the burden remains on the government.

> erty although he never posed any harm to society. If there is a similar error in confinement of an insanity-acquitted individual, there is not only the fact of harm already done, but the substantial prospect that the same error, ascribing the quality of mental disease to a less extreme deviance, resulted in a legal exculpation where there should have been legal responsibility for the antisocial action.
>
> The matter now being discussed is suffused with the broad consideration that modern standards of the insanity defense, not restricted to those who do not know right from wrong, call for the acquittal of persons who "may have meaningful elements of responsibility." And over and above the difficulty of situations where the issue of mental responsibility is doubtful, we cannot wholly ignore the danger of calculated abuse of the insanity defense, referred to in *Lynch v. Overholser* [, 369 U.S. 705 (1962)]. [*Brown*, *supra* at 407, 478 F.2d at 611 (footnote omitted).]

Appellant points out that *Brown* went on to suggest, on the basis of *Baxstrom*, *supra*, that there is a *quid pro quo* for this weaker insanity commitment standard, namely, that an acquitee is constitutionally entitled as of the end of the maximum prison term to release or, at worst, to civil commitment:

> The clear implications of the foregoing analysis, and *Baxstrom*, require, however, that when the individual has been in detention for a considerable period of time, his continued detention *vel non* should be governed by the same standard of burden of proof as applies to civil com-

> mitments. The extent of that period calls for sound discretion, would take into account *e.g.*, the nature of the crime (violent or not), nature of treatment given and response of the person, would generally not exceed five years, and should, of course, never exceed the maximum sentence for the offense, less mandatory release time. [*Brown, supra* at 408, 478 F.2d at 612 (footnote omitted).]

In summary, appellant argues that he had been led down the road by the United States Court of Appeals in *Brown, supra*, to a point beyond which he thought he would be taken seriously in a constitutional challenge to § 24-301(d).[5] That court had told him, in essence, not to bother challenging the release-hearing procedure but instead to assume that a partially-punitive commitment is valid under *Baxstrom, supra*. Thus, he asserted the right to release or civil commitment as of the end of the maximum prison term—at the point where society's right to any punitive gloss on confinement ends. Accordingly, he says, our first opinion in this case viewed his failure to attack § 24-301(d) incorrectly—and unfairly—by concluding that it could only have one meaning: tacit acceptance of a wholly rehabilitative underpinning to the commitment procedure, which justifies confinement beyond the maximum prison sentence.[6] We turn to this argument.

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[5] Appellant presumably would acknowledge, however, that *Brown, supra*, as a post-reorganization decision, is not binding on the court. *See M.A.P. v. Ryan*, D.C.App., 285 A.2d 310 (1971).

[6] Our assumption that appellant's acceptance of § 24-301(d) necessarily implied his agreement that the process was wholly rehabilitative was based on our view that *Baxstrom, supra*, and *Humphrey v. Cady*, 405 U.S. 504 (1972), would consti-

II.

In reconsidering appellant's assumption, solely for the sake of argument, that § 24-301(d) is valid, we must put the question in perspective by outlining the differences between the civil and criminal commitment schemes. Appellant, as an acquitee, carried the burden of proving his insanity at the time of the charged offense by a preponderance of the evidence. He had the right to a jury if he had wanted one. Upon a verdict of not guilty by reason of insanity, the District, like many states, permits continued confinement for a prescribed, relatively brief period of observation.[7] The courts have justified

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tutionally preclude confining acquitees under procedures less protective than those accorded to commitees if such confinement were "based, even in part, on punitive considerations." *Jones*, *supra* at 189. Thus, if § 24-301(d) were valid as a wholly rehabilitative procedure and confinement, any difference from a civil commitment determination under § 21-545(b) could only be justified on evidentiary grounds; *i.e.*, in contrast with a civil commitment, "the 'release hearing' procedure for an acquitee presumably can be somewhat abbreviated because of the predictive value of the initial determinations of insanity and dangerousness at the criminal trial." *Jones*, *supra* at 189. Because there is authority for such analysis, *see*, *e.g.*, *In re Franklin*, 7 Cal.3d 126, 496 P.2d 465, 101 Cal. Rptr. 553 (1972) (en banc), we interpreted appellant's acceptance of his confinement under § 24-310(d) as acceptance of a purely evidentiary justification for the differences between the criminal and civil commitment procedures —a justification presuming equally valid findings of mental illness and dangerousness under §§ 21-545(b) and 24-301(d). *See Jones*, *supra* at 188 n.7.

[7] In the District of Columbia, automatic confinement cannot exceed 50 days, D.C. Code 1973, § 24-301(d). In *Franklin*, *supra* at 143, 496 P.2d at 475, 101 Cal. Rptr. at 563, the court approved [illegible]y period in California. The Model Penal Code allows six months, ALI Model Penal Code § 4.08 (Proposed Official Draft 1962).

this confinement, which is not required in cases of civil commitment,[8] on at least two grounds. Some have stressed the continuing presumption of insanity once established by the acquitee—an evidentiary emphasis. *See, e.g., In re Franklin*, 7 Cal. 3d 126, 136, 496 P.2d 465, 470, 101 Cal. Rptr. 553, 558 (1972) (en banc). Others have emphasized the dangerousness inherent in the offense excused by insanity, and the need for protection of the public while psychiatric observation takes place—arguably a punitive emphasis. *See, e.g., Chase v. Kearns*, 278 A.2d 132, 135 (Me. 1971) (en banc).

These same courts, moreover, commonly justify statutory confinement beyond the observation period if, after a review proceeding (akin to a § 24-301(d)(2) "release hearing"), the acquitee fails to sustain the burden of persuading the court that he or she has recovered. Their reasoning reflects an extension of the justification for the observation period. First, apropos of the evidentiary emphasis, the courts note that the acquitee has initiated and once sustained the burden of proving insanity, whereas the prospective civil commitee has not yet so conclusively manifested mental illness and dangerousness. Thus, the presumption of an acquitee's insanity continues. Second, these courts conclude that, because the trier has found beyond a reasonable doubt that the acquitee has committed the charged offense (although he or she is not rationally or morally responsible for that act), it is

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[8] For example, in the District of Columbia, persons may be detained at a public or private hospital for up to 48 hours for emergency observation and diagnosis upon application by an appropriate authority and certification by a psychiatrist. D.C. Code 1973, §§ 21-521, -522. A detained individual must be released after 48 hours, however, unless a court order is obtained. D.C. Code 1973, § 21-523. *Williams v. Meredith*, D.C. App., 407 A.2d 569 (1979).

not unreasonable for society, as a matter of self-protection, to demand that the acquitee receive treatment for mental illness. Such treatment can be justified for at least as long as the maximum possible prison term he or she would have received, unless the acquitee can carry the burden of demonstrating an earlier recovery. The courts accordingly perceive a situational difference between acquitees and commitees constitutionally sufficient to justify keeping the burden of proof on the former but not the latter. *See Franklin, supra* at 138, 496 P.2d at 476, 101 Cal. Rptr. at 560 (acquitees are an "exceptional class"); *Chase, supra* at 138 (same).

After reviewing numerous cases, we conclude that the courts typically mix evidentiary and punitive rationales in justifying less comprehensive review of acquitees at "release hearings" than is afforded civil commitees at such proceedings.[9] In view of this precedent, we must agree that appellant's willingness to assume the constitutional validity of § 24-301(d)(2) cannot, in fairness, be said to imply a concession that all aspects of that proce-

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[9] *See, e.g., Mills v. State*, 256 A.2d 752, 755-57 (Del. 1969) (upholding release hearing procedure using regular superior court jury with burden of proof on acquitee; both rationales); *State v. Allen*, 166 N.W.2d 752, 758 (Iowa 1969) (acquitees may be required to prove regained sanity beyond a reasonable doubt; evidentiary and punitive rationales); *State v. Shackford*, 262 A.2d 359, 366 (Me. 1970) (same; punitive rationale); *Daniels v. Superintendent*, 34 Md.App. 173, 180, 366 A.2d 1061, 1069 (Ct. Spec. App. 1976) (acquitees can be required to carry burden of proof; evidentiary rationale); *State v. Taylor*, 158 Mont. 323, 331, 491 P.2d 877, 881 (1971), *cert. denied*, 406 U.S. 978 (1972) (same; punitive rationale); *In re Lee*, 46 App. Div.2d 999, 1000, 362 N.Y.S.2d 635, 636-37 (1974) (district attorney may participate in acquitee's release hearing; punitive rationale).

dure are justified solely on evidentiary (and thus non-punitive) grounds.[10]

III.

Now that we are confronted by the possibility that the criminal commitment procedure can, to some extent, be punitive yet constitutional, we must reconsider the nature of a § 24-301(d) confinement. There are three possibilities, not two as we originally perceived: (1) it is wholly rehabilitative (*i.e.*, not at all punitive), in which case an acquitee can be committed indefinitely, without regard to a hypothetical maximum prison sentence, subject only to the periodic review afforded civil commitees, *see Jones*, *supra* at 190; or, at the other extreme, (2) it is inherently punitive, in which case the release hearing procedure itself is unconstitutional, *see Baxstrom*, *supra*; *Humphrey v. Cady*, 405 U.S. 504, 510-11 (1972); *Brown*, *supra* at 409-10, 478 F.2d at 613-14 (Wright, J., dissenting); *Waite*, *supra* at 285-86, 475 F.2d at 396-97;[11] or, as appellant urges, (3) it is partially (but perhaps justifiably) punitive at the outset, in which case an acquitee, although lawfully confined for awhile, arguably must be released (or civilly committed) no later than the end of the maximum prison term for which the ac-

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[10] Accordingly, we retract the statement in our first opinion that "appellant must be presumed to agree that this confinement is not based, even in part, on punitive considerations; otherwise it would be unconstitutional under *Baxstrom*, *supra*; *see Humphrey v. Cady* . . . ." *Jones*, *supra* at 189.

[11] In this case, an acquitee would be entitled to release or to civil commitment proceedings promptly after the insanity acquittal. *See Bolton*, *supra*.

quitee could have been sentenced.[12] *See Brown, supra* at 408, 478 F.2d at 612.

Assuming the constitutional validity of § 24-301(d), we must choose between the first and third alternatives to decide the issue raised by appellant.[13] If we conclude—as previously assumed—that § 24-301(d) is wholly rehabilitative, then our first opinion and order will stand. If, however, we conclude that § 24-301(d) in some respects is punitive, then appellant's argument may have merit.

Confronting the question that we dealt with only hypothetically in our first opinion, we reject the view that an acquitee's mental illness and dangerousness at the time of the offense are consistently such powerful evidence of illness and dangerousness later (*i.e.*, at the time of the "release hearing") that they raise a presumption of continuing insanity in every case. *See Brown, supra*

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[12] We understand appellant to base his argument on the hypothetical maximum prison term to which the acquitee himself could be sentenced, not simply on the maximum sentence for the particular crime involved, without regard to the acquitee's own criminal history. We do not, however, resolve that question here.

[13] Appellant declines to question the constitutionality of § 24-301(d) and we agree that this court should not issue an advisory opinion on that subject. On the other hand, appellant has said that assuming the validity of § 24-301(d), he should not be held—as in our first opinion—to assume that it in no respect is punitive, since there is respectable legal precedent for the view that release-hearing procedures can be constitutional while partially punitive. We agree. Therefore, if, after examining § 24-301(d), we conclude that it *is*, to some extent, punitive, we properly can refrain from evaluating its constitutionality and, instead, can make a narrower analysis determining whether such punitive procedures can be imposed for an indefinite period.

at 409-10, 478 F.2d at 613-14 (Wright, J., dissenting); *Bolton, supra* at 8, 395 F.2d at 649. Thus, contrary to the assumption underlying our first opinion, we conclude that the difference between criminal and civil commitment procedures [14] cannot be justified on purely evidentiary grounds. It follows, therefore, that if society legitimately can place a greater burden on the acquitee to avoid continued confinement than it places on a prospective civil commitee, that burden must be justified by the public's interest in greater protection than it would be likely to receive by subjecting acquitees to the civil commitment process. Furthermore, because § 24-301(d) is premised, in part, on an earlier criminal offense—a confinement which might not have occurred if the government had the burden of proof before a new jury—this release-hearing procedure is, to some extent, "punitive."

The public's interest in safety is, of course, limited by the acquitee's right to equal protection. Assuming the best case for the constitutionality of § 24-301(d), appellant argues that its partially punitive character at least dictates, as a matter of equal protection vis-a-vis civil commitees, that acquitees be released (or civilly committed) no later than the end of the maximum prison term they could have received if criminally convicted. We agree.

According to *Baxstrom, supra* at 111, "[e]qual protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made" (citation omitted). *Accord, Bolton, supra* at 10, 395 F.2d at 651. On the basis of the partially punitive rationale for the criminal commitment

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[14] *Compare* D.C. Code 1973, § 24-301(d) *with* § 21-545(b).

scheme set forth earlier, *see* text and cases at note 9 *supra*, the criminal commitment scheme might survive equal protection scrutiny under *Baxstrom*, *supra*, even though the procedure for confining civil commitees provides greater protection for the individual at the outset (the right to a jury and burden of proof on the government). We agree with appellant, however, that there is no basis for confining an acquitee under § 24-301(d) beyond the length of the hypothetical maximum prison term, since that term marks the end of society's claim on that individual for any kind of punishment. Any longer confinement must depend, constitutionally, on a *de novo* civil commitment. *See Humphrey*, *supra* at 510-11; *Baxstrom*, *supra* at 110-11; *Brown*, *supra* at 408, 478 F.2d at 612.[15]

IV.

Accordingly, we hold that because the maximum possible prison term for which appellant Michael Jones could have been incarcerated has expired, he is entitled to release from St. Elizabeths Hospital, subject to the government's right to seek civil commitment. The opinion and judgment heretofore filed are therefore vacated. The government shall have 30 days from the date of the mandate issued pursuant to today's order in this case to initiate civil commitment proceedings against appellant. Once those proceedings have been initiated, he shall be

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[15] It is important to stress that if the § 24-301(d) release hearing is valid, as assumed, despite a partially punitive underpinning, our holding permits confinement under § 24-301(d) to the end of the maximum applicable prison term, no matter how long that may be. We perceive no basis for the *Brown* court's view that the punitive justification for § 24-301(d) may expire short of the maximum sentence (and "would . . . lly not exceed five years"). *Id.* at 408, 478 F.2d at 612.

confined, if at all, in accordance with Title 21 of the District of Columbia Code. In the event that appellant does not become the subject of civil commitment proceedings during this 30-day period, he shall be given his freedom.

So ordered.

MACK, *Associate Judge*, concurring: I concurred in our first opinion, 396 A.2d 183 (1978), because I did not construe that analysis as holding that the criminal commitment procedures of D.C. Code 1973, § 24-301 would pass muster as against a challenge on equal protection or procedural due process grounds, citing *Jackson v. Indiana*, 406 U.S. 715 (1972). I concur in the instant holding because the serious reservations that I held about the constitutionality of such procedures are erased by our choosing to mandate that an acquitee must be released from incarceration at the expiration of the maximum period of possible imprisonment for the criminal charge, subject to the government's right to seek civil commitment.

KELLY, *Associate Judge*, dissenting: I would adhere to our original decision to affirm the order on appeal (*Jones v. United States*, D.C.App., 396 A.2d 183 (1978)) and so dissent from this opinion on rehearing.

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APPENDIX C

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 11918

MICHAEL A. JONES, APPELLANT,

v.

UNITED STATES, APPELLEE.

On Petition for Rehearing En Banc

(Hon. Eugene N. Hamilton, Trial Judge)

(Argued En Banc Sept. 8, 1980 Decided May 29, 1981)

Silas J. Wasserstrom, Public Defender Service, for appellant.

Michael W. Farrell, Assistant United States Attorney, with whom *Charles F.C. Ruff*, United States Attorney, *John A. Terry* and *Oscar Altshuler*, Assistant United States Attorneys, were on the petition, for appellee.

Larry Martin Corcoran filed a brief as amicus curiae.

Before NEWMAN, *Chief Judge*, and KELLY, KERN, GALLAGHER,* NEBEKER, HARRIS, MACK, FERREN and PRYOR, *Associate Judges*.

Opinion for the court by *Associate Judge* KELLY.

* Judge Gallagher was an Associate Judge of the court at the time of argument. His status changed to Associate Judge, Retired, on February 27, 1981.

Dissenting opinion by *Associate Judge* FERREN, with whom *Chief Judge* NEWMAN and *Associate Judge* MACK join, at p. 25.

KELLY, *Associate Judge*: Appellant Michael A. Jones is a mental patient at St. Elizabeths Hospital where he has been committed since March 1976, pursuant to D.C. Code 1973, § 24-301(d).[1] In February 1977, he appealed

[1] Subsection 24-301(d), which controls the commitment of persons found not guilty by reason of insanity (acquittees), reads:

> (d)(1) If any person tried upon an indictment or information for an offense raises the defense of insanity and is acquitted solely on the ground that he was insane at the time of its commission, he shall be committed to a hospital for the mentally ill until such time as he is eligible for release pursuant to this subsection or subsection (e).
>
> (2) A person confined pursuant to paragraph (1) shall have a hearing, unless waived, within 50 days of his confinement to determine whether he is entitled to release from custody. At the conclusion of the criminal action referred to in paragraph (1) of this subsection, the court shall provide such person with representation by counsel—
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> > (A) in the case of a person who is eligible to have counsel appointed by the court, by continuing any appointment of counsel made to represent such person in the prior criminal action or by appointing new counsel; or
> >
> > (B) in the case of a person who is not eligible to have counsel appointed by the court, by assuring representation by retained counsel.
>
> If the hearing is not waived, the court shall cause notice of the hearing to be served upon the person, his counsel, and the prosecuting attorney and hold the hearing. Within ten days from the date the hearing was begun, the court shall determine the issues and make findings

from an order by Judge Eugene N. Hamilton denying his request for immediate release from St. Elizabeths or in the alternative for civil commitment in accordance with the procedures set forth in D.C. Code 1973, § 21-545(b),[2] basing his challenge to his continued confinement on the argument that detention beyond the maximum period for which he could have been imprisoned for the offense of which he was acquitted denies him equal protection of the laws.

Our first panel opinion, which relied on an express abstention from a challenge to his initial commitment, held

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of fact and conclusions of law with respect thereto. The person confined shall have the burden of proof. If the court finds by a preponderance of the evidence that the person confined is entitled to his release from custody, either conditional or unconditional, the court shall enter such order as may appear appropriate.

(3) An appeal may be taken from an order entered under paragraph (2) to the court having jurisdiction to review final judgments of the court entering the order.

[2] Subsection 21-545(b), concerning involuntary civil commitment, reads, in pertinent part:

If the court or jury finds that the person is mentally ill and, because of that illness, is likely to injure himself or other persons if allowed to remain at liberty, the court may order his hospitalization for an indeterminate period, or order any other alternative course of treatment which the court believes will be in the best interests of the person or of the public. The Commission, or a member thereof, shall be competent and compellable witnesses at a hearing or jury trial held pursuant to this chapter. The jury to be used in any case where a jury trial is demanded under this chapter shall be impaneled, upon order of the court, from the jurors in attendance upon other branches of the court, who shall perform the services in addition to and as part of their duties in the court.

that appellant had no right to the relief requested. *Jones v. United States*, D.C.App., 396 A.2d 183 (1978). Appellant petitioned for rehearing or rehearing en banc, objecting to the panel's decision as unfairly based on his abstention from a challenge to the initial commitment under D.C. Code 1973, § 24-301(d)(2). Rehearing was thereafter granted and a second opinion issued holding that appellant was entitled to immediate release unless the government civilly committed him pursuant to D.C. Code 1973, § 21-545(b) because the "release hearing procedure is to some extent 'punitive'" and it would be a denial of equal protection to confine appellant under criminal commitment procedures beyond his hypothetical maximum prison sentence. *Jones v. United States*, D.C.App., 411 A.2d 624 (1980). The government petitioned for rehearing en banc, disputing the determination that the District of Columbia commitment scheme for insane criminals is punitive. Its petition was granted and the case was reheard by the en banc court. Since our previous opinions were vacated, we consider anew appellant's equal protection claim and hold that he is not entitled to automatic release from St. Elizabeths upon the expiration of his hypothetical maximum prison sentence unless civil commitment proceedings are instituted by the government.

Appellant's commitment resulted from a September 1975, charge of attempted petit larceny. He was first admitted to St. Elizabeths because of a court-ordered competency examination.[3] On March 12, 1976, on stipulated facts as to the crime and as to insanity, appellant was acquitted by the court of the charge by reason of insanity.

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[3] *See* D.C. Code 1973, § 24-301(a). The psychologist's report stated that appellant was competent to stand trial, but that he had "signs and symptoms of a severe mental disorder, including auditory hallucinations" and that he should be hospitalized at St. Elizabeths for treatment.

On May 25, 1976, Judge James A. Washington held a "50-day release hearing" pursuant to D.C. Code 1973, § 24-301(d)(2)[4] and continued appellant's confinement at St. Elizabeths because of his failure to prove by a preponderance of the evidence that he was no longer mentally ill or dangerous to himself and others.[5] A further hearing was set for November 29, 1976. On that date, Judge Hamilton held a second hearing during which appellant raised the argument that his confinement under § 301(d) could not extend beyond his hypothetical maximum prison sentence and that he was therefore entitled to release. The court ordered the government to show cause why appellant should not be released or civilly committed under D.C. Code 1973, § 21-545(b). After a hearing in February of 1977, Judge Hamilton denied appellant's motion for immediate release or in the alternative, civil commitment, and continued his indefinite confinement at St. Elizabeths. A timely appeal from this order was filed on February 28, 1977.[6]

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[4] *See* note 1 *supra*.

[5] In an April 23, 1976 letter, the Superintendent of St. Elizabeths reported that Jones was suffering from schizophrenia, paranoid type, and was on medication. The letter also stated that "Mr. Jones is in need of further hospitalization, and by virtue of his mental illness, he would be a danger to himself and to others if released into the community at this time."

[6] A subsequent motion for unconditional release under § 301(k) was denied in March of 1977. Three months later, however, appellant was granted conditional release on terms recommended by St. Elizabeths' staff, allowing daytime and overnight visits into the community. He was also admitted into the civil division of the hospital, though as a result of disruptive behavior, he was retransferred to the forensic division.

Before analyzing appellant's equal protection claim, we deem it necessary to reject any suggestion that confinement pursuant to subsection 301(d) is punitive in nature. We recognize that appellant never explicitly made such an assertion, but that implication underlies his argument (and certainly our prior opinions) that the length of the prison sentence which an acquittee might have received determines when he is entitled to release or civil commitment under Title 24 of the D.C. Code. We conclude that there is no basis for finding § 301(d) punitive in any respect.

This court's decision in *Bethea v. United States*, D.C. App., 365 A.2d 64, 90 (1976), *cert. denied*, 433 U.S. 911 (1977), noted that "Congress struck a careful balance between the interests of the individual and those of the community," in the enactment of the District of Columbia commitment scheme for persons acquitted by reason of insanity. The purpose behind this careful balance was explained in *Hough v. United States*, 106 U.S.App.D.C. 192, 195, 271 F.2d 458, 461 (1959), when Judge Bazelon stated that

> [T]he basic policy underlying the statute . . . as we read the legislative history, is to provide treatment and cure for the individual in a manner which affords reasonable assurance for the public safety. . . .

More recent cases reiterate the dual purpose of § 301(d) as first, the treatment and recovery of the patient, and second, the protection of society and the patient. *Collins v. Cameron*, 126 U.S.App.D.C. 306, 308, 377 F.2d 945, 947 (1967); *Overholser v. O'Beirne*, 112 U.S.App.D.C. 267, 269, 302 F.2d 852, 854 (1961); *Ragsdale v. Overholser*, 108 U.S.App.D.C. 308, 312, 281 F.2d 943, 947 (1960). The 1970 amendments to § 301(d), enacted in

response to the decision in *Bolton v. Harris*, 130 U.S.App. D.C. 1, 395 F.2d 642 (1968),[7] have not altered its original purpose. *See United States v. Jackson*, 179 U.S.App. D.C. 375, 381, 553 F.2d 109, 115 (1976). Indeed, the *Bolton* decision inescapably leads to the conclusion of nonpunitiveness. This is because *Bolton's* requirement of a separate judicial hearing before indeterminate commitment was intended to undo the punitive aspects attending the formerly automatic connection between the determination of guilt and the commitment of a defendant who pleaded insanity.

The exclusively remedial and protective goals of the statute demonstrate that a punitive rationale has no part in the commitment of persons acquitted by reason of insanity. We agree that

> [i]n the light of [the legislative] purpose [of § 301], we must reject the District Court's suggestion that appellant is a "prisoner." Nothing in the history of the statute—and nothing in its language—indicates that an individual committed to a mental hospital after acquittal of a crime by reason of insanity is other than a patient. The individual is confined in the hospital for the purpose of treatment, not punishment; and the length of confinement is governed solely by considerations of his condition and the public safety. Any preoccupation by the District Court with the need of punishment for crime is out of place in dealing with an individual who has been

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[7] *Bolton* held that acquittees are entitled to a hearing "substantially similar" to the hearings afforded civil commitees before they are indeterminately confined. The implications of this holding are more fully discussed below.

acquitted of the crime charged. [*Hough v. United States*, *supra* at 196, 271 F.2d at 462.]

Society may not excuse a defendant's criminal behavior because of his insanity and at the same time punish him for invoking an insanity defense. This would nullify that defense, contrary to express legislative intent, *see* D.C. Code 1973, § 24-301(j) (establishing procedures for pleading insanity), and raise serious constitutional issues.

The regulatory nature of § 301(d) is also evidenced by the non-adversarial character of commitment decisions. All parties, including the government, the hospital * and the acquittee assist in presenting the facts relevant to a determination of the proper conditions and treatment for the insanity acquittee. *See United States v. Ecker*, 177 U.S.App.D.C. 31, 45, 543 F.2d 178, 192 (1976), *cert. denied*, 429 U.S. 1063 (1977); *Bolton v. Harris*, *supra* at 12 n.64, 395 F.2d at 563 n.64; *Lake v. Cameron*, 124 U.S.App.D.C. 264, 268, 364 F.2d 657, 661 (1966) (en banc).

Furthermore, plain reason compels rejection of appellant's reliance on his hypothetical maximum prison term as artificial and meaningless. Statutory maximum sentences have no relationship to the purposes of mental care and treatment. They are intended rather, to set the outer boundaries of lawful punishment for persons found criminally responsible for specified offenses. Not even convicted criminals are automatically sentenced to the maxi-

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* In *Dixon v. Jacobs*, 138 U.S.App.D.C. 319, 330, 427 F.2d 589, 600 (1970), the circuit court in reversing the dismissal of an insanity acquittee's habeas corpus petition, stated that "Saint Elizabeths bears a special responsibility for assuring that information regarding the patient's condition is fully presented to the District Court, and that the court understandingly ... considers the information presented."

mum applicable term of incarceration. Subsection 301 (d) commitments are neither expressly nor impliedly related to statutory maximum sentences. To the contrary, § 301(d) contemplates an indeterminate period of confinement and treatment, depending on when the patient has recovered his sanity or no longer poses a danger to himself or others.[9] As *Dixon v. Jacobs*, 138 U.S.App. D.C. 319, 325, 427 F.2d 589, 595 (1970) explains:

> Confinement of the mentally ill rests upon a basis substantially different from that which supports confinement of those convicted of crime. In the latter case, with rare exceptions, the continuing validity of confinement rests solely on the validity of the initial commitment. Confinement of the mentally ill, however, depends not only upon the validity of the initial commitment but also upon the continuing status of the patient. Specifically, under our statutes, he must be released from the hospital if he is no longer mentally ill; if, although he remains mentally ill, he is no longer "likely to injure himself or other persons"; or, should the patient so desire, if a course of outpatient treatment can be fashioned that will adequately protect the interests both of the patient and the public. [Footnotes omitted.]

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[9] Thus it would be more accurate to say, and certainly more analytically useful, that appellant is actually challenging the indeterminate length of his commitment at St. Elizabeths, rather than only his "continued" confinement there. Equal protection, if violated at all, would be just as well put into question at the inception of the commitment since it effectively means an indefinite period of confinement.

The notion that the duration of an acquittee's hospitalization can be established by statute or court order ignores the most basic precepts of medicine and psychiatry. Unfortunately, the present state of the art makes it generally impossible to predict either the time required to rehabilitate a mental patient, if at all possible, or at what point he will cease to be a danger to himself or others. Only ongoing medical and psychiatric evaluation offer a realistic hope of such prognosis.[10] Therefore, reference to either a hypothetical maximum prison sentence, or even to a judicially limited commitment term would completely refute the statutory purpose of § 301(d) and would frustrate any attempt at treating and rehabilitating mental patients who happen to have been acquitted of crimes by reason of insanity.

Our conclusion that § 301(d) is not punitive is supported by our recent decision in *United States v. Edwards*, D.C.App., —— A.2d —— (Nos. 80-294 & 80-401, May 8, 1981) (en banc), where the contention that incarceration inevitably constitutes punishment was rejected. Though commitment of acquittees is in no sense incarceration, the principle that the penal character of a statute depends on its underlying nature and whether it is reasonably supported by a legitimate state interest, applies

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[10] *See Addington v. Texas*, 441 U.S. 418, 430-31 (1979), and authorities cited therein, holding that the lack of certainty and the fallibility of psychiatric diagnosis make proof of insanity by clear and convincing evidence constitutionally sufficient. *Addington* also recognized that "[i]n a civil commitment state power is not exercised in a punitive sense." *Id.* at 428. While Chief Justice Burger's opinion did not deal with commitment of persons found not guilty by reason of insanity, a § 301(d) commitment is actually a civil, not a criminal proceeding and *Addington's* reasoning should apply with equal force to commitment of acquittees.

equally to the analysis of commitment statutes.[11] There is no evidence that the District of Columbia statutory scheme for commitment of insane criminals is anything but a regulatory, prophylactic statute, based on a legitimate governmental interest in protecting society and rehabilitating mental patients. Nor is § 301(d) rendered penal by the fact that it is predicated on the commission of a crime. Evidence of crime is only one of the elements triggering § 301(d) commitment, the other element being

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[11] *See Bell v. Wolfish*, 441 U.S. 520, 537-38 (1979). Factors relevant to the determination of whether a statute is punitive are:

> "Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions." [*Id.* at 537-38 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)).]

The *Bell* case also noted that

> A court must decide whether the disability is imposed for the *purpose* of punishment or whether it is but an incident of some other legitimate government *purpose* . . . . Absent a showing of an expressed *intent* to punish on the part of detention facility officials, that determination generally will turn on "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]." [*Id.* at 538 (quoting *Kennedy v. Mendoza-Martinez*, *supra* at 168-69, and citing *Flemming v. Nestor*, 363 U.S. 603, 613-17 (1960)) (emphasis added).]

proof of insanity by a preponderance of the evidence. Since the crime is relevant only insofar as it indicates dangerousness, not evil or criminal responsibility, the presumption of continuing dangerousness, which is rebuttable by the acquittee, is both reasonable and valid.

Because we have no evidence in the record that the conditions of appellant's confinement are punitive or that his particular commitment was based on punitive considerations, we must conclude that appellant's detention is grounded on the legitimate non-punitive interests of the District of Columbia.

Appellant challenges his confinement under § 301(d) as violative of equal protection of the laws. The due process guarantee of the Fifth Amendment of the United States Constitution, which is directly applicable to the District of Columbia, encompasses the right to equal protection. *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Matter of C.W.M.*, D.C.App., 407 A.2d 617, 625 (1979).

In the absence of specific objections to conditions of confinement or claims of inadequate or discriminatory treatment,[12] the validity of appellant's equal protection claim depends on whether the differences between the present § 301(d) commitment scheme and the involuntary commitment scheme under § 545(b) of Title 24 are justifiable by reason of the situational differences between acquittees and commitees.

Our analysis begins with the Supreme Court case of *Baxstrom v. Herold*, 383 U.S. 107 (1966), which held that equal protection requires that a prisoner to be

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[12] The right to treatment for mental illness is recognized in *Tribby v. Cameron*, 126 U.S.App.D.C. 327, 379 F.2d 104 (1967), and *Rouse v. Cameron*, 125 U.S.App.D.C. 366, 373 F.2d 451 (1966).

transferred to a mental hospital be given the same procedural protections as those afforded other persons subject to involuntary civil commitment. Two years later, the United States Court of Appeals for the District of Columbia found that *Baxstrom*'s equal protection holding, as well as the due process guarantees of *Specht v. Patterson*, 386 U.S. 605 (1967),[13] require that "persons found not guilty by reason of insanity . . . be given a judicial hearing with procedures substantially similar to those in civil commitment proceedings." *Bolton v. Harris*, *supra* at 10, 395 F.2d at 651 (footnote omitted). *Bolton* was expressly premised on the weakness of the proof of a defendant's insanity at the time of the offense; when *Bolton* was decided, the standard for acquittal was whether there was a reasonable doubt regarding past sanity. *Id.* at 8, 395 F.2d at 649. The 1970 amendments to § 301 have significantly narrowed this evidentiary gap by requiring that the defendant affirmatively prove his exculpating insanity to the jury by a preponderance of the evidence at the trial for his criminal offense. D.C. Code 1973, § 24-301(j).[14] The judicial hearing required by *Bolton* was codified in § 301(d)'s 50-day release hearing provision, notwithstanding the changed nature of the insanity defense.

The equal protection test suggested by these cases is that the procedures and standards of different commit-

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[13] *Specht* held that sentencing pursuant to Colorado's Sex Offenders Act was criminal punishment and violated due process because it made a conviction for a sex offense the basis of indeterminate sentencing without affording the defendant a hearing on the issue of his mental illness, dangerousness or recidivism.

[14] Subsection 301(j)'s shift in the burden of proof was upheld against constitutional attack in *Bethea*, *supra*, and *United States v. Greene*, 160 U.S.App.D.C. 21, 489 F.2d 1145 (1973), *cert. denied*, 419 U.S. 977 (1974).

ment schemes be relevant to the classification and that any differences not be substantial. We therefore agree with the statement in *United States v. Jackson*, *supra* at 386, 553 F.2d at 120, that § 301(d) "must be upheld if there is a rational basis for the scheme it creates." The court arrived at this conclusion by determining that neither *Jackson v. Indiana*, 406 U.S. 715 (1972) (indeterminate pretrial commitment procedures found to violate equal protection), nor *Baxstrom*, *supra*, held that strict scrutiny applies to procedures used for the criminal commitment of mentally ill persons.[15] In reviewing the petitioner's argument in *Baxstrom*, Chief Justice Warren stated that "[e]qual protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which classification is made." *Baxstrom*, *supra* at 111. *Bolton* also recognized that "a reasonable application [of the equal protection doctrine] permits Subsection (d) to treat persons acquitted by reason of insanity differently from civilly committed persons to the extent that there are relevant differences between those two groups." *Bolton*, *supra* at 10, 395 F.2d at 651. But substantial differences are prohibited under *Bolton*. *Id.* Thus, a reasonable distinction between the two statutory schemes would be one that is both relevant to the government's legitimate interests in the separate classification and not impermissibly substantial.

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[15] *See also State v. Krol*, 68 N.J. 236, ——, 344 A.2d 289, 298 (1975) (questioning the equal protection test applicable to differences in commitment schemes required by *Baxstrom*, *supra*, and *Jackson v. Indiana*, *supra*) and Novak, *Realigning the Standards of Review Under the Equal Protection Guarantees—Prohibited, Neutral and Permissive Classifications*, 62 GEO. L. REV. 1071, 1101-03 (1974) (suggesting that *Jackson v. Indiana*, *supra*, and *Humphrey v. Cady*, 405 U.S. 504 (1972), were based on a "demonstrable rational basis" test).

Before reviewing the differences between § 24-301(d) and § 21-545(b), it is important to note their similarities. First, the substantive standard of commitment is identical under both statutes. The twofold proof requirement of mental illness and dangerousness varies only in the manner in which it is established.[16] Second, both § 24-301(d)(2) and § 21-545(b) provide for mandatory judicial hearings, with notice and assistance of counsel (court-appointed if necessary). These common characteristics constitute the essential due process rights associated with involuntary commitment. *See Vitek v. Jones*, 445 U.S. 480 (1980) (recognizing a prisoner's due process rights to a hearing before transfer to a mental health facility);[17] *Specht v. Patterson*,

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[16] The two-prong test is explicitly stated in § 21-545(b); however, § 24-301(d) only refers to an acquittee's entitlement to release. But it is reasonable to assume that the same standard governs § 301(d) release hearings by reference to § 24-301(e), which states that entitlement to release, upon hospital certification, depends on a showing that the acquittee is no longer mentally ill or dangerous.

[17] Justice White approvingly listed the following procedures outlined by the Nebraska District Court as the minimum required before transfer of a prisoner to a mental hospital:

> A. Written notice to the prisoner that a transfer to a mental hospital is being considered;
>
> B. A hearing, sufficiently after the notice to permit the prisoner to prepare, at which disclosure to the prisoner is made of the evidence being relied upon for the transfer and at which an opportunity to be heard in person and to present documentary evidence is given;
>
> C. An opportunity at the hearing to present testimony of witnesses by the defense and to confront and cross-examine witnesses called by the state, except upon a finding, not arbitrarily made, of good cause for not

supra.[18] Thus with respect to important constitutional protections the two statutes provide the same coverage.

As persuasively explained in our first panel opinion, the differences between the two procedures

> can be justified by reference to situational differences between the two groups immediately prior to the respective hearings. The civil commitment question, as to any potential committee, is of first impression, whereas the "release hearing" procedure for an acquitee presumably can be somewhat abbreviated because of the predictive value of the initial determinations of insanity and dangerousness at the criminal trial. (That predictive value rests on the defendant's own prior proof of his insanity by a perponderance of the evidence—by a jury trial if he re-

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permitting such presentation, confrontation, or cross-examination;

D. An independent decisionmaker;

E. A written statement by the factfinder as to the evidence relied on and the reasons for transferring the inmate;

F. Availability of legal counsel, furnished by the state, if the inmate is financially unable to furnish his own; and

G. Effective and timely notice of all the foregoing rights." [*Vitek v. Jones*, *supra* at 494-95.]

[18] The *Specht* opinion held that

> Due process . . . requires that [the defendant] be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own. And there must be findings adequate to make meaningful any appeal that is allowed. [*Id.* at 610.]

quested it.) Whereas the § 24-545(b) hearing, therefore, represents a de novo process, the § 24-301(d) hearing is an updating process to determine how present mental status compares with earlier findings which had been urged by the defendant himself. . . . In either case, the only concern is a determination as to sanity and dangerousness, with a view to rehabilitation. Given these situational differences between acquitees and potential commitees immediately prior to the initial commitment determination, the difference in hearing procedures is arguably justified; there is no constitutional prohibition against rational differences in the treatment of differently situated persons. [*Jones v. United States*, *supra*, 396 A.2d at 189.]

There appear to be three differences between § 24-301(d) and § 21-545(b) commitments: (1) the availability of jury trial, (2) the question of who carries the burden of proof, and (3) the amount of proof required to justify commitment.[19] We review these distinctions individually to ascertain whether they are permissibly relevant or impermissibly substantial under *Baxstrom* and *Bolton*.

While the jury trial right available to commitees is not similarly available to an acquittee in a 50-day release hearing, this difference is justified by the fact that the acquittee has had a right to a jury determination of

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[19] We do not compare the differences in post-commitment procedures since they are not covered in these subsections and appellant's claim is based on the alleged invalidity of his confinement under subsection 301(d).

his sanity at the time of the offense.[20] Thus the acquittee's mental illness is initially established by affirmative proof. Dangerousness is no less validly established by proof that the defendant committed the criminal act, a finding necessarily underlying any acquittal by reason of insanity. *See Bethea, supra* at 93-95; *Smothers v. United State* D.C.App., 403 A.2d 306, 310 (1979). In *United States v. Ecker, supra* at 48, 543 F.2d at 195, the court stated that "[s]ince 1958 this court has consistently accepted the proposition that the dangerousness demonstrated by the commission of a crime and acquittal by reason of insanity constitutes a rational basis for the disparity in release provisions governing acquittees and commitees." (Footnote omitted). *Ecker* also recognized that some disparities in commitment proceedings are similarly permissible, *id.* at 49-50, 543 F.2d at 196-97, and explained that "[s]ubsection (d) patients are treated differently from civil commitees because they are 'an exceptional class of people' who have 'already unhappily manifested the reality of anti-social conduct.'" *Id.* at 50, 543 F.2d at 197 (footnotes omitted).

The fact that appellant's mental illness and dangerousness are not jury determined, but derived from a prior jury finding, is not significant since the continuation of these attributes is a rational and permissible evidentiary presumption.[21] In *Waite v. Jacobs*, 154 U.S.App.D.C.

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[20] Appellant's waiver of the right to a jury at his criminal trial does not affect our argument.

[21] It is also noteworthy that the Criminal Jury Instruction for the District of Columbia, No. 5.11 (3d ed. 1978), to be given when a defense of insanity is pleaded, informs the jury that the consequence of an acquittal by reason of insanity will be automatic commitment of the defendant to St. Elizabeths, followed by a release hearing within 50 days. The jury is also instructed that at this hearing the defendant

281, 288-89, 475 F.2d 392, 399-400 (1973), the validity of this presumption was recognized:

> The rational justification for placing the burden of proof on a commitee is that his mental illness and dangerousness have previously been convincingly established. In light of those established facts, the law gives effect to a presumption of continuity of status. It comports with normal perceptions of reality—and hence is rational—to assume that, once a given status is proven to exist, it continues to do so in the absence of evidence showing the contrary to be more likely than not.

In *Waite*, however, the presumption was not applicable because unlike in the instant case, the appellant had never been afforded a post-acquittal judicial hearing on the question of his continued mental illness and dangerousness.

The availability of a jury trial under § 21-545(b) and the absence of such a right at a § 24-301(d) hearing is also an insubstantial difference because the findings of mental illness and dangerousness are based on expert testimony and are not matters uniquely within the province of a jury of lay persons. In *Addington v. Texas*, 441 U.S. 418, 429 (1979), the Court explained that in contrast to delinquency proceedings or criminal prosecutions where "the basic issue is a straightforward factual question—did the accused commit the act alleged," the factual questions in a civil commitment proceeding "represent only the beginning of the inquiry." The Court

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must prove to the court, by a preponderance of the evidence, that he is entitled to release. This instruction was approved in *United States v. Brawner*, 153 U.S.App.D.C. 1, 29-30, 471 F.2d 969, 997-98 (1972).

continued: "Whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the *meaning* of the facts which must be interpreted by expert psychiatrists and psychologists." *Id.* (emphasis in original). Thus, both judge and juror are forced to rely on expert evidence in commitment proceedings, significantly diminishing the importance of their personal judgment, values and experience. In sum, because (1) an acquittee has a right to a jury determination of past insanity at his criminal trial; (2) it is reasonable to presume the continuation of a mental illness; and (3) a jury right in commitment proceedings is not as meaningful as it is in ordinary criminal cases, the absence of a jury right at a § 24-301(d) release hearing is not a substantial difference vis-à-vis § 21-545(b) civil commitment.

The second distinction between the two commitment procedures in the District of Columbia is the fact that the government bears the burden of proof in a § 21-545 (b) hearing, whereas in the 50-day release hearing, the acquittee must prove that he is no longer mentally ill or dangerous. It is entirely rational for the District to require an acquittee to prove his entitlement to release where he was the one to advocate the fact of his past insanity. Automatic § 301(d) commitment does not follow an acquittal by reason of insanity when the question of insanity is raised by the court or the prosecutor, rather than the defendant. *United States v. Wright*, 167 U.S.App.D.C. 309, 511 F.2d 1311 (1975). As mentioned above, the presumption that a mental condition continues is a reasonable one and it is also reasonable to require the person who raised the presumption to refute it by affirmative proof. Furthermore, whatever difference in risk allocation there might be between the two statutes as a result of who bears the burden of proof is mini-

mized by the fact that when the acquittee bears the burden, he need prove entitlement to release by only a preponderance of the evidence, the lowest standard of proof, whereas when the government bears the burden, it must prove insanity and dangerousness by a higher standard, namely that of clear and convincing evidence. *In re Nelson*, D.C.App., 408 A.2d 1233 (1979).

Yet this disparity in the level of proof by which mental illness and dangerousness are established under the two procedures, when not regarded as a counter-balance to the risk of non-persuasion, is another difference between § 24-301(d) and § 21-545(b) which must be justified as rationally related to the situational differences between acquittees and commitees. An acquittee's past insanity is proven by a preponderance of the evidence. His present insanity is determined by his failure to rebut, by a preponderance of the evidence, the presumption of continuing insanity. In contrast, a commitee's detention is based on clear and convincing evidence of mental illness and dangerousness. *In re Nelson, supra.*[22] The difference between these two standards is justified by the fact that Congress determined that a defendant raising an insanity defense should not have to meet a higher burden on such a relatively difficult issue. However, when the District seeks to commit a person who is disputing the

[22] Since appellant has not challenged his initial commitment, we view his argument as based on a present denial of equal protection. We note, however, that in May 1976, when appellant received his 50-day release hearing, the prevailing standard was proof beyond a reasonable doubt, *In re Hodges*, D.C.App., 325 A.2d 605 (1974) (overruled in *In re Nelson, supra*). The greater disparity in proof between the two commitment standards that existed when appellant was first committed would not alter our conclusion that the difference in the level of proof required is both rational and not so substantial as to violate equal protection.

fact of insanity or dangerousness, it is reasonable that the risk of error be more heavily thrust upon the government. *See Addington v. Texas, supra.*

In *Bolton, supra* at 10 n.50, 395 F.2d at 651 n.50, and in *United States v. Brown*, 155 U.S.App.D.C. 402, 478 F.2d 606 (1973), the circuit court also recognized that a preponderance standard is enough to provide equal protection to acquittees.

Appellant has argued that a series of later Supreme Court and circuit court decisions based on an equal protection theory support his entitlement to release as of the expiration of his hypothetical maximum prison term. However, the cases cited by appellant are all distinguishable.

In *Humphrey v. Cady*, 405 U.S. 504 (1972), a defendant convicted of contributing to the delinquency of a minor was committed to a "sex deviate facility" in a Wisconsin state prison in lieu of sentence. The statute authorizing such commitment provided an initial term equal to the maximum sentence the defendant could have received, and five-year renewals based on a judge-made finding of dangerousness. The statutory scheme in *Humphrey* clearly included an express punitive element evidenced by the limitation of the initial commitment term to a period corresponding to that applicable to those convicted.[23]

In the same term that it decided *Humphrey*, the Supreme Court held that indefinite confinement of a person

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[23] We disagree with the interpretation of *Humphrey* in *Waite v. Jacobs, supra* at 287, 475 F.2d at 398, that there is little difference between the position of an acquittee and that of a convicted defendant subject to the Wisconsin statute, since we have determined that there is no punitive element to § 301(d) commitments.

charged with a crime and found incompetent to stand trial violated equal protection because the criminal charges were insufficient to prove either that the defendant was dangerous or that he required treatment. *Jackson v. Indiana, supra. Jackson* is inapposite to the instant case because Jackson was never tried for the crime with which he was charged. *See United States v. Ecker, supra* at 49-51, 543 F.2d at 196-98 (distinguishing *Jackson* for same reason in equal protection challenge to § 24-301(e)). Since his continued detention was not based on any other evidentiary predicate of dangerousness, it therefore became invalid after "the reasonable period of time necessary to determine whether there is a substantial probability that [the person held] will attain [the] capacity [to stand trial] in the foreseeable future." *Id.* at 738.

Appellant's reliance on the District of Columbia Circuit cases of *Waite v. Jacobs, supra,* and *United States v. Brown, supra,* is also unavailing.[24] Waite was acquitted before the *Bolton* decision and therefore automatically committed after a finding of not guilty by reason of insanity without a judicial hearing on his continued mental illness and dangerousness, which was subsequently required by *Bolton* and codified in § 24-301(d)(2). Waite's commitment was therefore invalid from the beginning and arguably justifiable only as penal detention. As such, it was limited to the applicable maximum sentence period.

Brown was a "post-*Bolton*, pre-1970 amendments" acquittee who challenged the burden of proof at his post-

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[24] These cases are not formally binding on this court because they were decided after February 1, 1971, the effective date of the District of Columbia Court Reform and Criminal Procedure Act of 1970. *M.A.P. v. Ryan,* D.C.App., 285 A.2d 310 (1971).

acquittal judicial hearing. The Court of Appeals in *Brown* upheld the preponderance standard applied, justifying the difference in the level of proof vis-à-vis the level of proof required in § 21-545(b) proceedings by the "meaningful elements of responsibility" which an acquittee may have. Insofar as this reasoning suggests a punitive element to § 301(d) we reject it as inconsistent with our finding that the commitment scheme for acquittees is not intended to attribute any guilt or imply any social indebtedness in the excuse of a criminal offense. Therefore, we need not follow the dicta in *Brown* that "[t]he extent of [the commitment] period [justified by a post-*Bolton*, pre-1970 amendments commitment] calls [for] sound discretion, would take into account, *e.g.*, the nature of the crime (violent or not), nature of treatment given and response of the person, would generally not exceed five years, and should, of course, never exceed the maximum sentence for the offense, less mandatory release time." *Id.* at 408, 478 F.2d at 612. As previously explained, the only factors relevant to release from a mental institution are the acquittee's continued dangerousness and his need for treatment. Judicial limitations on the duration of confinement based on hypothetical prison terms or other arbitrary determinations of a maximum term of hospitalization, as suggested in *Brown*, have no relation to the purpose of the statute. In any event, the need for such limitations has been obviated by the enactment of the 1970 amendments to § 24-301.

For the foregoing reasons, the trial court's order denying appellant's right to immediate release or, in the alternative, civil commitment pursuant to D.C. Code 1973, § 21-545(b) is

Affirmed.

FERREN, *Associate Judge*, with whom NEWMAN, *Chief Judge*, and MACK, *Associate Judge*, join, dissenting: I continue to subscribe to our division opinion on rehearing, 411 A.2d 624 (1980), *vacating* 396 A.2d 183 (1978).

I.

Under the civil commitment process, D.C. Code 1973, §§ 21-541 to -545, the government has the burden of proving a person is mentally ill and dangerous to self or others—and proving it to a jury if the potential commitee so demands. *Id.* § 21-544. In contrast, under the "insane criminal" commitment process, D.C. Code 1973, §§ 24-301 to -303, a defendant acquitted by reason of insanity has the burden of proving he or she no longer is mentally ill or dangerous—without the right to a jury. *Id.* § 24-301(d)(2).

Our colleagues in the majority conclude that these differences in treatment of two classes of institutionalized persons—commitees and acquitees—do not violate the acquitee's constitutional right to equal protection of the laws. In response to the allegation that the procedural shortcuts in § 24-301 reflect a punitive purpose, in contrast with a wholly therapeutic purpose underlying the civil commitment process, the majority concludes "that there is no basis for finding § 301(d) punitive in any respect." *Ante* at 6.[1]

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[1] The majority maintains that the lesser protections in § 24-301—burden of proof on the acquitee, without right to jury trial—do not alter its equivalence to §§ 21-544 and -545, for the acquitee already has had a right to jury trial on the conduct manifesting insanity, and the shift in burden of proof is justified by a valid evidentiary presumption that the acquitee's insanity at the time of the offense—which he himself asserted—continues to the time of the release hear-

I do not understand the majority to disagree with the proposition that *if* § 24-301(d) imposes punishment in any respect, the analysis in our division opinion is constitutionally sound.[2] It would follow that, "because the

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ing. That hearing, therefore, unlike a civil commitment proceeding, is a procedure to update, not initiate, the inquiry.

In our division opinion on rehearing we rejected that analysis. We noted that the presumption of continuing insanity is questionable, spanning as it does months or even years between the time of the offense and the time of the release hearing. Furthermore, we saw that the courts analyzing criminal and civil commitment schemes in other jurisdictions "typically mix evidentiary and punitive rationales in justifying less comprehensive review of acquitees at 'release hearings' than is afforded civil commitees at such proceedings." 411 A.2d at 628-29 (footnote omitted). Differences such as a shift in the burden of proof and withdrawal of the right to a jury are commonly justified, in part, "by the public's interest in greater protection than it would be likely to receive by subjecting acquitees to the civil commitment process." *Id.* at 630. We concluded, therefore, that "the difference[s] between criminal and civil commitment procedures cannot be justified on purely evidentiary grounds." *Id.*

[2] In our division opinion on rehearing, we summarized our analysis:

> Assuming the best case for the constitutionality of § 24-301(d), appellant argues that its partially punitive character at least dictates, as a matter of equal protection vis-a-vis civil commitees, that acquitees be released (or civilly committed) no later than the end of the maximum prison term they would have received if criminally convicted. We agree.
>
> According to *Baxtrom* [*v. Herold*, 383 U.S. 107, 111 (1966)], "[e]qual protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made" (citation omitted). *Accord, Bolton* [*v. Harris*, 130 U.S.App.D.C. 1, 10, 395

maximum possible prison term for which appellant Michael Jones could have been incarcerated has expired, he is entitled to release from St. Elizabeths Hospital, subject to the government's right to seek civil commitment." 411 A.2d at 630.

I therefore propose to discuss in greater detail the determinative issue: whether § 24-301(d) is, to some extent, punitive.

II.

The Supreme Court has identified several factors for use in determining whether a statute is punitive. A court first should look for "objective manifestations of congressional purpose." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169 (1963). *Accord, Bell v. Wolfish*, 441 U.S. 520, 538 (1979). Where it is not clear on the face of the statute whether Congress had a punitive intent, a court must consider a variety of other factors:

F.2d 642, 651 (1968)]. On the basis of the partially punitive rationale for the criminal commitment scheme set forth earlier, *see* text and cases at note 9 *supra*, the criminal commitment scheme might survive equal protection scrutiny under *Baxstrom*, *supra*, even though the procedure for confining civil commitees provides greater protection for the individual at the outset (the right to a jury and burden of proof on the government). We agree with appellant, however, that there is no basis for confining an acquitee under § 24-301(d) beyond the length of the hypothetical maximum prison term, since that term marks the end of society's claim on that individual for any kind of punishment. Any longer confinement must depend, constitutionally, on a *de novo* civil commitment. *See Humphrey* [*v. Cady*, 405 U.S. 504, 510-11 (1972)]; *Baxstrom*[, *supra* at 110-11]; [*United States v. Brown*, 155 U.S.App.D.C. 402, 408, 478 F.2d 606, 612 (1973)].

411 A.2d at 630 (footnote omitted).

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions. [*Kennedy, supra* at 168-69 (footnotes omitted).]

Accord, Bell, supra at 537-38. In the present case, we confront a statute for which Congress clearly had a punitive purpose.

A. *The Previous Statute and Judicial Construction*

Analysis begins with the previous statute. *See, Kennedy, supra* at 170. Under D.C. Code 1967, § 24-301(d), a defendant who successfully interposed the insanity defense was committed automatically—and indefinitely—to a mental institution. However, in *Bolton v. Harris*, 130 U.S.App.D.C. 1, 395 F.2d 642 (1968), the United States Court of Appeals for the District of Columbia Circuit held that automatic commitment of acquitees was unconstitutional—a denial of equal protection vis-a-vis commitees. The court accordingly required that, upon a finding of not guilty by reason of insanity, an acquitee was constitutionally entitled to the equivalent of a civil commitment proceeding, which came to be known as the "*Bolton* hearing."[3] Five years later, in *United States*

[3] In reaching this result, the court relied on *Baxstrom v. Herold*, 383 U.S. 107 (1966), and *Specht v. Patterson*, 386

v. Brown, 155 U.S.App.D.C. 402, 408, 478 F.2d 606, 612 (1973), the court held that even after a "*Bolton*" hearing the disparities of treatment were such that "insane criminal" commitment under D.C. Code 1967, § 24-301, having a partially punitive purpose, must be limited to the hypothetical maximum sentence (less mandatory release time), after which the acquitee would be entitled either to release or to a civil commitment proceeding. *Accord*, *Waite v. Jacobs*, 154 U.S.App.D.C. 281, 284-85, 475 F.2d 392, 395-96 (1973).

Apropos of *Brown*, the en banc majority concedes in the present case that the prior statute had "punitive aspects," a quality that *Bolton* was necessary to "undo." *Ante* at 7. And yet in the same paragraph the majority states that "[t]he 1970 amendments to § 301(d), enacted in response to" *Bolton*, "have not altered its original purpose," *ante* at 6-7, which the majority—in a nonsequitur—characterizes as nonpunitive by reference to *Hough v. United States*, 106 U.S.App.D.C. 192, 271 F.2d 458 (1959) and other pre-*Bolton* circuit court decisions. The majority, therefore, is inherently inconsistent. If, as the majority concedes, the pre-*Bolton* statute was punitive, to the point that *Bolton* was necessary to correct its unconstitutional impact, I do not see how statutory amendments "in response to *Bolton*," providing lesser protections, can be said automatically to remove the original, "punitive aspects" of that statute. The question remains: do the 1970 amendments modifying *Bolton* erase the punitive purpose of the previous statute?

U.S. 605 (1967). The circuit court expressly modified its earlier decisions in *Overholser v. O'Beirne*, 112 U.S.App. D.C. 267, 302 F.2d 852 (1961); *Ragsdale v. Overholser*, 108 U.S.App.D.C. 308, 281 F.2d 943 (1960); and *Overholser v. Leach*, 103 U.S.App.D.C. 289, 257 F.2d 667 (1958), *cert. denied*, 359 U.S. 1013 (1959). *Bolton*, *supra* at 12, 395 F.2d at 653.

B. *The Present Statute and Its Construction*

1. Legislative history confirms that, in amending § 24-301(d) in 1970, Congress held on to its original intent to punish the criminal offender, if not by conviction and imprisonment then by indefinite confinement in a mental institution. The overriding concern of the House of Representatives was that *Bolton* "permits dangerous *criminals* . . . 'to have it both ways'—to escape both conviction and con.....ent to a hospital." HOUSE COMM. ON THE DISTRICT OF COLUMBIA, DISTRICT OF COLUMBIA COURT REFORM AND CRIMINAL PRODEDURE ACT OF 1970, Section 207—*Insane Criminals*, at 74, H.R. REP. No. 91-907, 91st Cong., 2d Sess. (emphasis added) (quoting *Overholser v. O'Beirne*, 112 U.S.App.D.C. 267, 276, 302 F.2d 852, 861 (1961)). The House considered the possibility that a criminal offender could get off without being either convicted or hospitalized "intolerable." *Id. See United States v. Jackson*, 179 U.S.App.D.C. 375, 381-82, 553 F.2d 109, 115-16 (1976).

The congressional intention in drafting the present § 24-301(d), therefore, was "to meet the objections of the *Bolton* court while preserving the principle of the *mandatory commitment* of those who escape criminal responsibility on the ground of mental abnormality." *Bethea v. United States*, D.C.App., 365 A.2d 64, 92 n.62 (1976), *cert. denied*, 433 U.S. 911 (1977) (emphasis added). Congress wanted to confront the criminal defendant with a choice: conviction or "the very real possibility of prolonged therapeutic confinement." *Id.* at 90 (footnote omitted). Because "the prospect of commitment to a mental institution for an indefinite period is much less desirable than a fixed term in prison," *United States v. Freeman*, 357 F.2d 606, 626 n.60 (2d Cir. 1966), Congress intended the substantial likelihood of indefinite confinement to provide an effective deterrent to those tempted to misuse the insanity defense to avoid

criminal incarceration. In short, the legislative history of the 1970 amendments provides strong evidence that Congress, in overruling *Bolton*, intended to restore as much punishment under § 24-301(d) as constitutionally would pass muster.

2. More than the legislative history, the legislative result—the statute itself—reveals that Congress maintained its punishment objective.

First, the authorized procedures by which an acquitee may challenge confinement in a mental institution, D.C. Code 1973, §§ 24-301(d)(2), -(k)(1) through (6), do nothing more than institutionalize the habeas corpus procedure that already was available at the time of *Bolton*. *See Miller v. Cameron*, 118 U.S.App.D.C. 323, 324, 335 F.2d 986, 987 (1964); *O'Beirne, supra at* 275, 302 F.2d at 860; *Ragsdale v. Overholser*, 108 U.S.App.D.C. 308, 313-14, 281 F.2d 943, 948-49 (1960); D.C. Code 1967, § 24-301(g). Procedurally, therefore, the acquitee is no better off under § 24-301 today than he or she was under the same statute before 1970. Unless the acquitee can prove he or she is not mentally ill or dangerous, confinement under § 24-301 is both automatic and indefinite.[4]

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[4] My colleagues' implication that altering the burden of proof and denying acquitees a right to jury trial are minor procedural distinctions from civil commitment, *see ante* at 15-21, is inconsistent with Congress' purpose in amending the statute to overrule *Bolton*. As this court recognized in *Bethea, supra*, imposing the burden of proof on the acquitee is a significant procedural distinction from civil commitment; it is designed to make it more difficult for the acquitee to gain freedom. *Id.* at 91-92. Indeed, where proof is often difficult to assess, *see Addington v. Texas*, 441 U.S. 418, 429 (1979), "the allocation of the burden of proof may be outcome determinative." *Waite supra* at 284, 475 F.2d at 395.

The majority's discounting of the role of the jury when questions of mental capacity are at issue is also in direct

Second, upon confinement, acquitees are not necessarily treated the same as commitees. In this jurisdiction, an individual is found not guilty by reason of insanity if "as a result of a *mental disease* or *defect* he lacked substantial capacity either to recognize the wrongfulness of his conduct or to conform his conduct to the requirements of law." *Bethea, supra* at 79 (emphasis added). Ordinarily, this jurisdiction treats individuals suffering from a mental "defect" (*i.e.*, mental retardation) differently from the way it treats individuals suffering from a mental illness. Under civil commitment procedures, a mentally defective individual who is "not insane nor of unsound mind to such an extent to require his commitment to a hospital for the mentally ill" is committed to Forest Haven, a facility for retarded persons. D.C. Code 1973, §§ 21-1101, 32-601. In contrast, an acquitee, even if only suffering from a mental defect, is committed to a hospital for the mentally ill, Saint Elizabeths. *Id.*, § 24-301 (d).

In *United States v. Jackson, supra*, the court upheld this distinction in treatment precisely because it recog-

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conflict with our ruling in *Bethea, supra*, which emphasized that, despite the impact of psychiatric testimony, it is for the jury, not the psychiatric expert, to decide the accused's mental state. *Id.* at 82-83. The majority's emphasis on the factfinder's reliance on expert testimony in accessing the accused's mental state (and thus on the lesser need for a jury) was recently rejected by the United States Court of Appeals for the District of Columbia Circuit in *United States v. Ecker*, 177 U.S.App.D.C. 31, 543 F.2d 178 (1976), *cert. denied*, 429 U.S. 1063 (1977). There, the court upheld the trial court's refusal to release an acquitee from a mental hospital despite the recommendations of his doctors, stating, "*the district court must independently 'weigh the evidence' and make a de novo determination* that the patient will not in the reasonable future endanger himself or others." *Id.* at 40, 543 F.2d at 187 (emphasis in the original).

nized that Congress "intended that *all* defendants acquitted by reason of insanity should be distinguished from all other persons, including persons civilly committed for mental diseases or retardation." *Id.* at 381, 553 F.2d at 115 (emphasis in original). In *Jackson*, the court justified this difference in treatment on the basis that acquitees, but for their insanity plea, had been found guilty of crimes against society. *Id.* at 387, 553 F.2d at 121. Apropos of *Jackson*, this difference in treatment of certain acquitees cannot possibly be justified merely on the basis of an evidentiary presumption concerning the continuing mental condition of the acquitee. *See* note 1 *supra*. Rather, it is an express statutory provision, justified by reference to the criminality of the acquitee's prior conduct.

Third, and perhaps most telling, is another example of differing possibilities for release of acquitees and commitees after confinement. When the superintendent of Saint Elizabeths Hospital certifies that a commitee is cured, the individual is discharged from the hospital. D.C. Code 1973, § 21-590. In contrast, when the hospital superintendent certifies that an acquitee has recovered, the government may demand a hearing. At this hearing, if the court is not convinced that the acquitee has recovered, the court may order his or her return to the hospital even though the authorities there consider the individual well enough for release. D.C. Code 1973, § 24-301(e).

In *United States v. Ecker*, 177 U.S.App.D.C. 31, 543 F.2d 178 (1976), *cert. denied*, 429 U.S. 1063 (1977), an acquitee challenged the constitutional validity of this added hurdle—court approval—before release. Five years after a jury had found the defendant not guilty of rape and murder by reason of insanity, the superintendent of Saint Elizabeths recommended conditional release. After a hearing, despite the recommendation of the examining psychiatrists, the trial court denied the hospital's re-

quest and ordered continued hospital confinement. In upholding the statute and the trial court's decision, the federal circuit court expressly relied on the fact that Ecker had committed a violent criminal act.[6] *Id.* at 52, 543 F.2d at 199. Whether or not the hospital psychiatrists thought Ecker should be released, the trial court had a duty to protect "the public against whom the acquitee has already been shown to have committed one or more criminal acts, thus differentiating himself from the civil commitee." *Id.* at 51, 543 F.2d at 198. "More importantly," the court rejected Ecker's equal protection argument based on *Jackson v. Indiana*, 406 U.S. 715 (1972), *Baxstrom v. Herold*, 383 U.S. 107 (1966), and *Humphrey v. Cady*, 405 U.S. 504 (1972), reasoning "that the criminal conviction may justify some differences in procedural safeguards if the differences are 'limited by the nature of the defendant's crime *or the maximum sentence authorized for that crime*'" *Id.* at 51-52, 543 F.2d at 198-99 (quoting *Humphrey*, *supra* at 511) (emphasis added). Because Ecker could have been incarcerated, however, for a life sentence if not acquitted by reason of insanity, the differences in release procedures (between acquitees and commitees) were therefore justifiable. Finally, the court rejected the hospital recommendation by saying that even if the hospital were correct "that a step-by-step reentry into the community [was] essential to Ecker's continued improvement," an acquitee "who has committed violent criminal acts" has "no right to treatment at the community's peril." *Id.* at 52-53, 543 F.2d 199-200.

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[6] The circuit court, more than once, has relied on the nature of the underlying offense to justify the consequences of confinement under § 24-301(d). In *United States v. Jackson*, *supra*, the court emphasized that the defendant had been acquitted by reason of insanity of first degree burglary and rape, in contrast with mere theft of small sums which would "not indicate excessive dangerousness." *Id.* at 387, 553 F.2d at 121.

Given the legislative history, the differences in treatment of acquitees and commitees, and the judicial gloss on the statute by decisions such as *Ecker*, the majority's position that the purpose of the statute is solely to "treat[] and rehabilitat[e] mental patients who happen to have been acquitted of crimes by reason of insanity," *ante* at 10, is unsupportable. Acquitees are not just mental patients "who happen" to have been acquitted of crimes by reason of insanity. The fact of their criminal conduct continues to play a decisive role in the nature of their treatment and their chances for release after initial commitment. Congress and the courts have justified this harsher treatment precisely because acquitees have committed crimes.

C. *The Relevance of the Statutory Maximum Sentence*

The majority rejects the use of statutory maximum sentences to determine the maximum length of confinement under § 24-301 because such maximums have "no relationship to the purposes of mental care and treatment." *Ante* at 8. I agree. The majority states that "[t]he notion that the duration of an acquitee's hospitalization can be established by statute or court order ignores the most basic precepts of medicine and psychiatry. . . ." *Ante* at 10. Again, I agree. If the acquitee were hospitalized solely for medical reasons, I would be the first to concur that a statutory maximum for confinement based on the nature of the acquitee's criminal conduct would have no relevance or application. But the problem is—and is so clearly evident in *Ecker*—that acquitees are not confined to mental institutions for medical reasons alone. They are confined there in part because society is unwilling to allow those who have committed crimes to escape without paying for their crimes. The intent of the statute is partially punitive, and thus the procedures under § 24-301 reflect this added burden on the defend-

ant. Because of this punitive purpose, the maximum statutory period of confinement becomes relevant, for at that point society no longer has a valid interest in continued confinement on the basis of a shortcut procedure. *Brown*, *supra* at 408, 478 F.2d at 612; *see Waite*, *supra* at 285, 475 F.2d at 396; note 2 *supra*.*

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* Although the foregoing discussion is sufficient to demonstrate the congressional purpose underlying D.C. Code 1973, § 24-301, I note briefly that the other *Kennedy* factors confirm the punitive intent.

By definition, confinement to a mental institution is "an affirmative disability or restraint," *id.* at 168, even more perhaps than imprisonment, *see Vitek v. Jones*, 445 U.S. 480, 493-94 (1980), given the indefinite duration and the stigma. *See Addington*, *supra* at 425-26. Despite its use for treatment, moreover, confinement for mental illness and dangerousness as a consequence of a criminal act "has historically been regarded as a punishment," *Kennedy*, *supra* at 168, for which the Supreme Court continually has had to write constitutional guidelines. *See, e.g., Jackson v. Indiana*, *supra*; *Humphrey*, *supra*; *Specht*, *supra*; *Baxstrom*, *supra*.

Criminal confinement also comes into play "only on a finding of *scienter*," *Kennedy*, *supra* at 168; *see Bethea*, *supra* at 94, and "the behavior to which it applies is already a crime," *Kennedy*, *supra* at 168, by virtue of the criminal conviction that precedes it. The statute also "promote[s] the traditional aims of punishment—retribution and deterrence," *id.*, for, as already indicated, Congress and this court have noted a desire to prevent the misuse of the insanity defense by making the consequences more severe than *de novo* civil commitment. In addition, criminal confinement at a mental institution serves other goals of punishment, incapacitation and rehabilitation. *See United States v. Brown*, 381 U.S. 437, 458 (1965) ("Punishment serves several purpose: retributive, rehabilitative, deterrent—and preventive"). *See generally* J. VORENBERG, CRIMINAL LAW & PROCEDURE 44-57 (1975).

Finally, for reasons already discussed, I do not believe there is a wholly nonpunitive, "alternative purpose," *Ken-*

III.

Society's right to punish Michael Jones for his first offense, a misdemeanor—stealing a coat—has long since expired. As every day passes he is denied equal protection of the laws.[7] Michael Jones should be released unless civilly committed.

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nedy, supra at 168-69, assignable to § 24-301; but even if the purposes assigned by the majority—treatment of the acquitee and protection of society—were altogether nonpunitive, the indefinite confinement of Michael Jones for stealing a coat is well beyond any public protection gloss on the statute's purpose. It is one thing to keep an acquitee of murder and rape confined for life, *see Ecker, supra*, as he would be under appellant's theory here, for those are life-sentence crimes. But society has no "protection" interest in confining Michael Jones indefinitely for stealing a coat, a misdemeanor punishable by maximum confinement for one year.

[7] When a court confronts different procedural safeguards afforded to different classes of individuals committed to mental institutions, concerns of equal protection and due process become interrelated. *See Jackson v. Indiana, supra* at 731; *cf. Humphrey, supra* at 511 (1972) (noting with favor the state court's consideration of Equal Protection Clause as relevant to procedural due process analysis); *Specht, supra* at 608 (commitment proceedings for sex offenders subject both to Equal Protection and Due Process Clauses). In evaluating equal protection for the acquitee, I have not reached the question of due process as an independent concern, although there is a serious question here. I note, moreover, that any effort to reduce the procedural safeguards afforded to civil commitees, while possibly resolving equal protection problems, would raise serious questions of due process for that class of individuals.